CONRAIL®

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September 8, 2006

Via UPS overnight delivery and telefax

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423

Re: Finance Docket No. 33388 (Sub-No. 100)
Petition for Clarification or in the Alternative For
Supplemental Order – North Jersey Shared Assets Area

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding is an original and ten copies of the Reply of Consolidated Rail Corporation to Petitioners' Motion to Compel Responses to Discovery Requests Involving Relevancy Objections.

Please confirm receipt and filing of this response by time-stamping the extra copy of this letter and returning it in the enclosed self-addressed envelope.

Sincerely,

John K. Enright

cc: Counsel for parties of record

Before The
Surface Transportation Board

Finance Docket No. 33388 (Sub-No. 100)

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CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

REPLY OF CONSOLIDATED RAIL CORPORATION TO PETITIONERS' MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS INVOLVING RELEVANCY OBJECTIONS

Consolidated Rail Corporation ("Conrail") submits this reply to the Motion to Compel Responses to Discovery Requests Involving Relevancy Objections filed by petitioners Bridgewater Resources, Inc ("BRI") and ECDC Environmental L.L.C. ("ECDC") on September 5, 2006.

Conrail concurs with and joins in the reply being filed by Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") to the motion to compel responses to Interrogatories 3, 4, 7 and 8 and Document Request No. 2 to the extent it seeks information pertaining to the Raritan Valley Railroad. In this reply, Conrail will specifically reply to the motion to compel to the extent it seeks to require responses to Interrogatory No. 9 and Document Request No. 3, which were addressed only to Conrail.

ARGUMENT

I. CONRAIL PROPERLY OBJECTED TO INTERROGATORY NO. 9, WHICH SEEKS INFORMATION ABOUT CONRAIL'S SWITCHING SERVICES TO OTHER CUSTOMERS SINCE SPLIT DATE.

In their Petition For Clarification Or In The Alternative For Supplemental Order—North Jersey Shared Assets Area, filed on January 20, 2006, petitioners ask the Board to determine that BRI's waste transfer facility is within the North Jersey Shared Assets Area ("NJSAA"). The petition acknowledged that the facility has been served since June 1, 1998 ("Spilt Date") by NS trains and crews. It also asserted that "BRI has occasionally requested and received a switch between its facility and Manville yard from a Conrail crew when a NS crew was unavailable, in order to avoid the over-accumulation of trash at its transfer station (which is a health and safety issue for Somerset County) and keep empty cars from clogging CSXT's Manville Yard." Pet. at 5.

NS filed a motion to dismiss the petition, contending the Transaction Agreement and the North Jersey Shared Assets agreement unambiguously show that the BRI facility is outside the NJSAA. NS and Conrail also moved for a protective order quashing petitioners' discovery requests or, alternatively, suspending them pending a ruling on the motion to dismiss.

In a decision served on July 31, 2006, the Board denied NS' motion to dismiss, but it stated:

> NS has presented strong evidence, based on the transaction agreement, to support its claim that the BRI facility is located outside the NJSAA. Nevertheless, it is appropriate for the Board to allow for *limited discovery for BRI to obtain evidence to further develop the record as to what the parties intended in their original transaction agreement* before resolving the issues that are presented here.

Slip op. at 4 (emphasis supplied.) The Board further stated:

> The Board will allow for *limited discovery pertaining to the parties' intent in defining the NJSAA boundaries in the original transaction agreement.* The Board is particularly

> interested in what the parties meant by the use of the term "CP," or control point, in defining the SAAs. Therefore, the NS and Conrail motions for protective order are denied *to the extent needed to permit the limited discovery.*

Id. at 5 (emphasis supplied.)

With respect to the petitioners arguments based on their claim that Conrail had occasionally provided switching service to the facility, the Board pointedly stated:

> The Board notes that Conrail's past switching service of the BRI facility is not controlling in determining whether the BRI facility is within the NJSAA.

Slip op. at 4.

Despite this statement, Interrogatory No. 9 asks:

> *Please state whether Conrail provides or has provided, since the Split Date, switching service to any shipping or receiving facility that is located on right-of-way, property or track in or near the NJSAA that Conrail does not own under the Shared Assets Area Operating Agreement for North Jersey and/or any other agreements implementing the Conrail control transaction approved by the Board in Decision No. 89 in Finance Docket No. 33388. If the answer to this question is affirmative, please identify (a) each facility to or from which switching service is or has been provided since the Split Date, including its location and the name of the shipper or receiver involved, (b) the traffic switched, and (c) the name of the yard(s) or other points to or from which Conrail delivered or received the traffic to/from NS or CSX.*

Conrail objected to this interrogatory on the grounds that it is irrelevant, not reasonably calculated to lead to the discovery of relevant evidence, and would be unduly burdensome.

In their motion to compel, petitioners' argue that this interrogatory is relevant and appropriate to test the validity of NS' alleged contention in its motion to dismiss that "property *ownership* is the deciding factor in determining what track Conrail can operate over in the vicinity of Port Reading Jct." Motion to Compel at 12. Petitioners attempt to overcome Conrail's objection of burdensomeness by narrowing the request for information to "information concerning the regular (*i.e.*, repeated) provision of switching service to industries owned or located on or served via track or other property that Conrail does not own in the general vicinity

of Manville, Port Reading Jct., Bound Brook and Bound Brook Jct., NJ." *Id.*

Conrail notes at the outset that petitioners' relevancy arguments appear to be based on a mischaracterization of NS' statements in its motion to dismiss. NS' motion to dismiss appears to have contended that under the terms of the North Jersey Shared Assets Agreement, Conrail's right to perform switching services on specific railroad tracks and facilities depends primarily on whether those tracks and facilities are part of the North Jersey Shared Assets Area, not on whether they are owned by Conrail. See NS Motion to Dismiss at 6-9. As NS noted in its motion (*id.* at 6), the North Jersey Shared Assets Agreement defines "Shared Assets" as tracks, rights of way and other property "which CRC [Conrail] owns, leases or has the right to operate over," and defines "Shared Asset Areas" as "the geographical area comprising the Shared Assets and Operator [*i.e.*, NS or CSX] Facility and Jointly Operated Facility directly (without intermediate connection to another railroad) attached to trackage included within the Shared Assets . . . ." NJSAA Agreement §§1(ss) and (tt).

In any case, Interrogatory No. 9 is irrelevant to the issue whether the BRI facility is within or connected to the NJSAA. What comprises the NJSAA and other Shared Assets Areas as well as Conrail's rights to provide switching services are defined and determined by the Transaction Agreement and the three Shared Assets Area agreement, and the July 31, 2006 decision allowed "limited" discovery only for the purpose of determining "what the parties intended in their *original transaction agreement*" and "the parties' intent in defining the NJSAA boundaries in the *original transaction agreement.*" Slip op. at 4, 5 (emphasis supplied). Even

with respect to the switching services allegedly performed by Conrail for the BRI facility itself,[1] the July 31, 2006 decision specifically stated that "Conrail's past switching service of the BRI facility is not controlling in determining whether the BRI facility is within the NJSAA." Indeed, a moment's reflection shows that this statement is clearly correct. If Conrail, inadvertently or otherwise, provided switching service to a facility outside the SAAs in apparent contravention of the Transaction Agreement and the relevant SAA agreement, surely such an act would not cause that facility to suddenly become part of the SAA and entitle the facility thereafter to switching services from Conrail.[2]

Whether, during the eight years since Split Date, Conrail has provided switching services to facilities other than BRI's facility is even more clearly irrelevant to any issue presented by the BRI/EDCD Petition. Indeed, it is even more preposterous to presume, as petitioners' argument implicitly does, that Conrail switching services to certain facilities outside the SAAs could be a basis for determining that *other* facilities outside the SAAs are entitled to be included within an SAA.

Petitioners' narrowing of this interrogatory to information concerning "the regular (i.e., repeated) provision of switching services to industries located on or served by track or other

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1 Inasmuch as this reply is not an evidentiary submission, it takes no position with respect to the factual accuracy of petitioners' claims concerning Conrail's past service or any other factual contention.

2 Indeed, such a result would be particularly perverse if it were based on instances in which Conrail provided such services at the request of the facility to meet an emergency situation, as BRI alleges Conrail occasionally did at BRI's facility near Port Reading Junction. Such a result would effectively allow rail customers to alter the boundaries of the SAAs to their benefit and the detriment of NS and CSXT on the basis of Conrail's having helped them in emergency situations.

property that Conrail does not own in the general vicinity of Manville, Port Reading, Bound Brook and Bound Brook Jct, NJ" does nothing to add to the relevancy of the requested information. Quite the opposite, in fact. Petitioners have not claimed that Conrail's alleged service to BRI's facility was "regular" or "repeated," whatever those terms may mean. On the contrary, the petition characterized the alleged service as "occasional[]." There would be no reasonable basis for concluding that "regular" or "repeated" switching services provided to other facilities outside the NJSAA could be grounds for concluding that the BRI facility is within the NJSAA, whether or not such other facilities were in the "general vicinity" (what that may mean) of Manville, Port Reading, Bound Brook and Bound Brook Jct, NJ.

Nor does the purported narrowing significantly reduce the burdensomeness of the request. Conrail would still have make a determination of what facilities outside the NJSAA were in the "general vicinity" of the specified locations, then search through records of thousands of rail movements over an eight year period to see whether any of them were provided switching services by Conrail and then try to decide whether such services, if any, were "regular" or "repeated."

II. CONRAIL PROPERLY OBJECTED TO DOCUMENT REQUEST NO. 3 CONCERNING THE DISPOSITION OF THE "READING CONNECTOR."

Interrogatories 3 and 4 requests information concerning what petitioners call the "Reading Connector," which their petition identifies as a former one-mile segment of tract, which once extended from Port Reading Junction northward to Bound Brook Jct. and which was abandoned in approximately 1985. Conrail, as well as NS and CSXT, objected to these

interrogatories on the ground that the history and status of the former Reading Connector have no bearing on the issues for which limited discovery is being permitted pursuant to the Board's July 31, 2006 Decision.

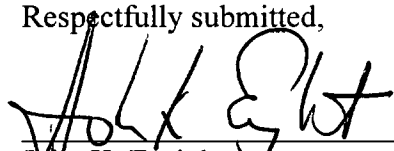
NS' reply to the motion to compel discusses at length why the information sought by these interrogatories is irrelevant and beyond the scope of the limited discovery allowed. Conrail concurs with that discussion and opposes the motion to compel responses to those interrogatories for the reasons stated by NS.

A related document request, Document Request No. 3, which is addressed solely to Conrail, states:

> *Please produce all documents related to the sale, lease, abandonment or other disposition of the Reading Connector or any part thereof (including but not limited to treatment or disposition thereof under the Final System Plan).*

Conrail objects to this document production request on the same grounds of irrelevancy as discussed in NS's reply to the request to compel responses to Interrogatories No. 3 and 4.

Respectfully submitted,



John K. Enright
Associate General Counsel
On behalf of Respondent
Consolidated Rail Corporation

September 8, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2006, I served copies of the foregoing Reply to Motion to Compel upon counsel for Petitioners and counsel for the Conrail control applicants and other known parties of record, as follows:

By e-mail and UPS overnight delivery

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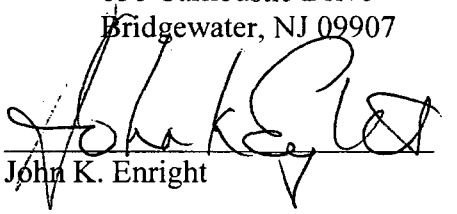

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